Supreme Court, U.S.
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No. 94-2022

In The

Supreme Court of the United States

October Term, 1995

STATE OF LOUISIANA,

Petitioner,

vs.

THEODOR A. SCHIRMER,

Respondent.

On Petition For Writ Of Certiorari
To The Louisiana Supreme Court

OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the State of Louisiana has a compelling interest in banning all political activity regardless of content, including non-ballot-related activity, within 600 feet of a polling place on election day?

(2) Whether La. R.S. 18:1462A(3) & (4), which enacts a complete ban on all political activity within 600 feet of a polling place on election day, is narrowly tailored to serve a compelling state interest?

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INTRODUCTION

This case involves a First Amendment challenge to Louisiana's electioneering law, La. R.S. 18:1462A(2), (3) & (4). In *State of Louisiana v. Schirmer*, 646 So. 2d 890 (La. 1994), the Louisiana Supreme Court declared sections (3) and (4) of this statute unconstitutional on overbreadth grounds, and section (2) unconstitutional as void for vagueness.[1] The State of Louisiana has requested that this Court grant a writ of certiorari or, in the alternative, order a summary reversal of the Louisiana Supreme Court's decision and uphold the constitutionality of La. R.S. 18:1462A.

Respondent Theodor A. Schirmer agrees that the granting of the writ of certiorari for purposes of reviewing the decision of the Louisiana Supreme Court declaring La. R.S. 18:1462A(2), (3) & (4) unconstitutional is appropriate and necessary to resolve a direct conflict of federal constitutional interpretation between that court and the Fifth Circuit U.S. Court of Appeals.[2] This case implicates First Amendment issues of the highest order that remain unresolved by this Court and presents those

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[1] Without waiving the right to address it on the merits, Respondent will not address that portion of the Louisiana Supreme Court's opinion declaring La. R.S. 18:1462A(2) unconstitutional as void for vagueness.

[2] In addition, there is a conflict between the Fifth Circuit U.S. Court of Appeals and the Eleventh Circuit U.S. Court of Appeals. *Compare, Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993) with *Clean-Up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985) (holding unconstitutional Florida's electioneering law, which prohibited solicitation of signatures on a petition within 300 feet of a polling place on election day).

issues in a posture particularly well-suited for resolution by this Court. Respondent strongly opposes Petitioner's request in the alternative for summary reversal of the decision of the Louisiana Supreme Court.

STATEMENT OF THE CASE

On October 3, 1992, Respondent was arrested at a polling place at Robert E. Lee High School in East Baton Rouge Parish, Louisiana, and charged with violating La. R.S. 18:1462A(2), (3) & (4).[3] Respondent filed a civil federal declaratory relief action in the U.S. District Court for the Middle District of Louisiana on October 7, 1992, seeking to enjoin enforcement of the statute on the grounds that it violates the First and Fourteenth Amendments to the U.S. Constitution. On October 20, 1992, U.S. District Judge Frank Polozola denied injunctive relief and upheld the statute as constitutional. Respondent appealed to the Fifth Circuit, and sought a temporary injunction pending appeal, which Judge Polozola denied. The Fifth Circuit then certified the following question to the Louisiana Supreme Court regarding the statute's construction:

> Whether La. R.S. 18:1462A proscribes on election day, outside of the polling place itself but within a radius of six hundred feet from the entrance thereto, all solicitation of signatures for a recall petition that is not on the ballot that is to be voted on at the election for which the polling

[3] For purposes of the petition for certiorari, Respondent does not contest Petitioner's version of the underlying facts as set forth in the petition.

> place is open, and in the polling place or said six hundred foot radius all wearing of clothing or buttons bearing visible words or symbols supportive of such recall?

Without passing on the constitutionality of the statute at that time, the Louisiana Supreme Court answered that question in the affirmative. *Schirmer v. Edwards*, 608 So. 2d 948, 948-49 (La. 1992). The Fifth Circuit, relying on *Burson v. Freeman*, 504 U.S. 191, 112 S. Ct. 1846 (1992), then granted a temporary injunction pending appeal, barring enforcement of the statute outside of the 100 foot boundary approved in *Burson*. *Schirmer v. Edwards*, No. 92-3900 (5th Cir. Oct. 19, 1992). *See* App. 1. The State sought a stay of the temporary injunction from this Court, which denied the stay. *Edwards v. Schirmer*, ___ U.S. ___, 113 S. Ct. 444 (1992).

The case was then reassigned to a different panel of the Fifth Circuit to address the merits of the case. That panel, citing *Burson*, found first that Louisiana has a compelling state interest in maintaining "campaign-free zones" on election day. *Schirmer v. Edwards*, 2 F.3d 117, 120-21 (5th Cir. 1993), *cert. denied sub nom., Recall '92 v. Edwards*, ___ U.S. ___, 114 S. Ct. 1396 (1994). The Fifth Circuit then found that the statute was narrowly tailored to achieve that end. Noting that it would be burdensome to require a state to prove that any particular distance is warranted, the court found that Louisiana's choice of the 600 foot boundary was narrowly tailored because it was enacted only after a previous 300 foot boundary was determined by the legislature to be inadequate. *Id.* at 121-22. The court then addressed the total ban on all political activity, and found that two reasons justified

such a sweeping ban. First, the court accepted the State's contention that a total ban on all political activity is superior to a ban only on ballot-related activity because of "enforcement and security problems" arising from attempts to distinguish ballot-related activity from non-ballot-related activity. *Id.* at 122-23. Second, the court accepted the State's contention that activity such as soliciting signatures for a recall petition is *more* disruptive than any other political speech because it requires the voter to accept or reject the position of the worker on the spot. *Id.*

During the pendency of the federal action, a criminal prosecution was initiated against Respondent in state district court. Respondent filed a motion to quash. The trial court held a hearing on the motion to quash on July 19, 1993, and, citing *Burson*, granted the motion, concluding that the statute was unconstitutionally overbroad because it prohibits all political activity within six hundred feet of polling places on election day.

The State appealed the trial court's decision to the Louisiana Supreme Court, which affirmed on federal constitutional grounds only. *See State of Louisiana v. Schirmer*, 646 So. 2d 890 (La. 1994). The Louisiana Supreme Court applied a variant of strict scrutiny to the statute, and, citing *Burson*, concluded that the statute was unconstitutionally overbroad because it extended the 100 foot radius found permissible in *Burson* to 600 feet, reasoning:

> when th[e] blanket proscription on political speech is extended to 600 feet we find that "a difference only of degree" becomes a difference of kind, a difference of "constitutional dimension." *Burson, supra*, at ___, 112 S. Ct. at 1857.

> This is particularly true when the 600-foot limitation is considered in the crowded urban context, where, because of greater population density, polling places tend to be more closely situated. In such circumstances the 600 foot radius may often include a large number of surrounding streets, alleyways, and neutral grounds, with the application of the statute as written stifling political speech in traditional public fora.

State of Louisiana v. Schirmer, 646 So. 2d at 901. The Louisiana Supreme Court went on to conclude that the size of the area, coupled with the total ban on all political activity, constituted a "significant impingement" on the First Amendment, and therefore rendered the statute unconstitutionally overbroad. *Id.* at 901-02 ("[W]e find it sufficient to say that in establishing a 600 foot boundary which proscribes all manner of political speech, not just speech related to matters on the ballot, Louisiana has crossed th[e] line."). The State sought rehearing, which the Louisiana Supreme Court denied.

ARGUMENT

This case is appropriate for review because the decision of the Louisiana Supreme Court is in direct and total conflict with a decision of the Fifth Circuit U.S. Court of Appeals on a matter of federal constitutional interpretation. *See* Rule 10.1.(b) of the Supreme Court of the United States. In addition, this case presents core First Amendment issues which have not been, but should be, resolved by this Court. *See id.* at Rule 10.1.(c). Furthermore, the

decision of the Fifth Circuit U.S. Court of Appeals is in direct conflict with a decision of the Eleventh Circuit U.S. Court of Appeals. *See Clean-Up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985).

Summary reversal of the decision of the Louisiana Supreme Court, however, is wholly unwarranted. That court's holding declaring La. R.S. 18:1462A(3) & (4) unconstitutionally overbroad is consistent with this Court's First Amendment jurisprudence.

In *Burson v. Freeman*, 504 U.S. 191, 112 S. Ct. 1846 (1992), this Court addressed the constitutionality of Tennessee's electioneering statute, which prohibited ballot-related political speech within a 100 foot radius of polling places on election day. A plurality of this Court, applying strict scrutiny, upheld the statute. This Court first found that the State had a compelling interest in preventing voter intimidation and preserving the integrity of elections. *Id.* at 1851. Next, concluding that a "minor geographic limitation" does not constitute a significant impingement on the First Amendment, this Court held that the Tennessee statute was narrowly tailored to serve those interests. *Id.* at 1857. In so concluding, however, this Court stated one limitation of its ruling, noting that "[a]t some measurable distance from polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden. . . ." *Id.*

Burson left open the two questions directly posed in this case:

(1) is a statute that enacts a *complete* ban on *all* political activity regardless of content

around a polling place on election day narrowly tailored to serve a compelling state interest? and

(2) if such a statute could be constitutional, at what distance from the polling place must the state's interest give way to the fundamental right of the people to engage in core political speech?

Respondent contends that under controlling First Amendment jurisprudence, as well as the fundamental precepts of the free exchange of ideas on which our polity are founded, a state can have no interest sufficiently compelling to warrant a total ban on all political activity in and around a polling place on election day, and that if such a compelling interest does exist, that interest dissipates with each literal step away from the actual polling place, such that a ban like that enacted by La. R.S. 18:1462A(3) & (4) on all political activity that encompasses a total area of roughly 1,130,000 square feet (approximately 26 acres) is per se unconstitutional.

It is a basic tenet of First Amendment jurisprudence that statutes which impose content based restrictions on speech are subject to strict scrutiny. Indeed, "a content based restriction on political speech in a public forum must be subjected to the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 321, 108 S. Ct. 1157, 1164 (1988). Because La. R.S. 18:1462A singles out political speech in a public forum for proscription – a category of speech to which "the First Amendment has its fullest and most urgent application" – it can survive constitutional scrutiny only if the statute is narrowly tailored to serve a compelling state interest. *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214, 223, 109 S. Ct. 1013, 1020

(1989) (citation omitted). Further, there is no doubt that Respondent's activity – circulating a petition – constitutes core political speech. *Meyer v. Grant*, 486 U.S. 414, 421-22, 108 S. Ct. 1886, 1892 (1988).

A plurality of this Court found in *Burson* that a state has a compelling interest on election day in restricting speech related to issues actually on that day's ballot within a certain area around polling places. *See Burson*, 112 S. Ct. at 1851-52. However, it is Respondent's position that a state can have no interest sufficiently compelling to ban non-ballot-related political activity absolutely. Indeed, if the First Amendment stands for anything, it is that on an election day the people must be free to engage in the active exchange of ideas, "[f]or speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S. Ct. 209 (1964).

La. R.S. 18:1462A(3) & (4) is unconstitutionally overbroad for two reasons. First, Petitioner's statement in the petition notwithstanding (*see* Petition at 8), the statute *clearly* bans *all* political activity, not just that related to the issues on that day's ballot and not just political campaigning. *See Schirmer v. Edwards*, 608 So. 2d 948 (La. 1992).[4] This is in stark contrast to the statute upheld by this Court in *Burson*. Such restriction is tantamount to outright censorship of core First Amendment speech.

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[4] Also, contrary to Petitioner's statement in the petition, (*see* Petition at 9), if the statute sections at issue in this case are held unconstitutional by this Court, Louisiana will still have an electioneering statute that prohibits ballot-related political activity on election day. *See* La. R.S. 18:1462A(1).

Even if it is permissible to restrict some political speech on election day to serve the State's interest in protecting voters and insuring the integrity of the election process, this statute's reach is an unconstitutionally overbroad means of serving that end.[5]

Second, the statute is overbroad because it bans political speech in an area far greater than that found permissible in *Burson* – six times the radius and thirty-six times the area. Such an area often will include such traditional public fora as streets, sidewalks and parks. This broad sweep renders the statute fatally overbroad, and, as the Louisiana Supreme Court concluded, such a large area constitutes "a difference of kind, a difference of constitutional dimension," compared to the restricted area upheld in *Burson*. *Schirmer*, 646 So. 2d at 901. Whatever the State's interest in protecting the integrity of the polling

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[5] The arguments regarding the statute's tailoring that were accepted as persuasive by the Fifth Circuit are without legal or logical merit. The mere fact that law enforcement agents would have to distinguish between ballot-related and non-ballot-related activity cannot suffice to justify a total ban. Taking such reasoning to its logical conclusion, only a total ban on *all* speech would suffice to achieve the State's end, and that surely is not permissible. Second, the notion that recall petitions are somehow more disruptive than any other political speech is without any factual or logical support. Indeed, if anything, logic dictates that such a petition, which offers a voter the opportunity to participate in the democratic process without actually taking a side on the issue by signing a petition simply to put a matter on the ballot, is *less* disruptive than partisan campaign workers pressuring a voter to take a side. Additionally, ballot measure petitions have a long and cherished tradition in this country, and constitute core political speech. *Meyer v. Grant*, 486 U.S. 414, 421-22, 108 S. Ct. 1886, 1892 (1988).

place, surely it cannot justify prohibiting core political speech unrelated to that day's ballot on a public street two football fields away.

Statutes such as La. R.S. 18:1462A(3) & (4) represent a dangerous undermining of the very foundation of the First Amendment: "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment [i]s to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218, 86 S. Ct. 1434 (1966). If the State can ban all political activity within 600 feet of a polling place on election day, what principled basis is there for preventing it from banning all speech of any sort within that area on election day? If the State can ban all political activity in a 600 foot radius on election day, what principled basis is there for preventing it from extending that ban city or county or state-wide? That is, if the State's interest in protecting voters from undue influence on election day is so compelling, why stop at 600 feet, and why stop with political speech?

CONCLUSION

This case presents First Amendment questions of the highest order, questions that this Court should resolve on the merits. First, the Louisiana Supreme Court's decision and the decision of the Fifth Circuit are in direct and complete conflict. Second, all states have electioneering laws which enact varying restrictions on distance and type of speech, making this an issue of great relevance

nationwide. Third, and most critically, this case involves core First Amendment issues left unresolved by this Court in *Burson*.

For all of these reasons, Respondent respectfully requests that this Court grant Petitioner's petition for certiorari, deny Petitioner's request for summary reversal, and schedule this case for briefing and oral argument.

Dated: October 9, 1995

Respectfully submitted,

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APPENDIX 1

THEODOR A. SCHIRMER, et al, Plaintiffs — NUMBER 92-3000

Shelley E. Corrington,
Individually,
Et Al, Plaintiffs,
- Appellants

versus

EDWIN W. EDWARDS, Governor of the State of Louisiana, and in His Official Capacity, et al., Defendants-Appellees

United States Court of Appeal, Fifth Circuit

Before GARWOOD, DAVIS and JONES, Circuit Judges.

BY THE COURT:

Before the Court is the motion of Plaintiffs-Appellants for injunction pending appeal.

Plaintiffs-appellants are parties seeking to collect signatures on a petition for a recall election seeking the recall of Louisiana Governor Edwin Edwards pursuant to La. R.S. 18:1300.0, *et seq*. They seek to collect such signatures in the vicinity of polling places on the general election day of November 3, 1992. Plaintiffs do not seek to collect these signatures within any such polling places; they do apparently intend to vote while wearing clothing or buttons supportive of the recall effort. Neither the recall nor Governor Edwards is on the November 3 ballot, and plaintiffs do not seek to solicit any signatures, or conduct any activity, with respect to any matter or proposition that is on the November 3 ballot. Defendants-

appellees are the Governor of Louisiana, the Louisiana Attorney General, and the Secretary of State of Louisiana. They have taken the position that La.R.S. 18:1462A prohibits the activity in which Plaintiffs desire to engage within a radius of six hundred feet of the entrance to any polling place, even though none of the matters as to which signatures are sought and the activity desires to be conducted is related to any matter on the ballot.[1]

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[1] Section 1462 provides:

"§ 1462. Acts prohibited on election day: electioneering; exception; enforcement; penalty.

A. Except as otherwise specifically provided by law, it shall be unlawful for any person, between the hours of 6:00 a.m. and 9:00 p.m. to perform or cause to be performed any of the following acts within any polling place being used in an election on election day or within any place wherein absentee voting is being conducted, or wherein absentee voting is being conducted, or within a radius of six hundred feet of the entrance to any polling place being used in an election on election day or any place wherein absentee voting is being conducted:

(1) To solicit in any manner or by any means whatsoever any other person to vote for or against any candidate or proposition being voted on in such election.

(2) To remain within any such polling place or place wherein absentee voting is being conducted or within a radius of six hundred feet of the entrance of any such polling place, except when exercising the right to vote, after having been directed, in writing, by an election commissioner or law enforcement officer to leave the premises or area of a polling place or after having been directed, in writing, by a registrar or deputy registrar to leave the place wherein absentee voting is being conducted.

Plaintiffs brought this suit in the court below seeking a preliminary and permanent injunction prohibiting Defendants from denying to Plaintiffs what Plaintiffs contend are their rights under the First Amendment of the United States Constitution to engage in the above described activity, and contending that such activity is not prohibited by section 1462A. Defendants contend that the activity Plaintiffs desire to engage in is prohibited by section 1462A and that section 1462A, as so construed, is constitutional under the decision in *Burson v. Freeman*, 112 S.Ct. 1846 (1992). Plaintiffs contend to the contrary, arguing principally that the six hundred foot radius established by section 1462A is excessive as compared to the one hundred foot radius sustained in *Burson*, and that the state's interest in proscribing conduct such as theirs is attenuated because their proposed activities do not relate to any matter being voted on, unlike the situation in *Burson*.

On October 19, and 20 the district court held a two-day evidentiary hearing on both the preliminary injunction and the merits, at the conclusion of which the court orally rendered its findings and conclusions in open court. The district court ruled that section 1462A did apply to the activities Plaintiffs desired to engage in, and that the statute as so construed was facially constitutional

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(3) To hand out, place, or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever.

(4) To place or display political signs, pictures, or other forms of political advertising.

under *Burson*.[2] The district court denied Plaintiffs' request for temporary and permanent injunctive relief and dismissed their suit with prejudice. Plaintiffs appeal to this Court. As noted, Plaintiffs have moved this Court to issue an injunction pending appeal enjoining Defendants

> "from enforcing La. R.S. 18:1462 against Plaintiffs in such a manner as to preclude Plaintiffs from:
>
> (a) during the period of absentee voting, October 22 through October 28, 1992, and on election day, November 3, 1992, circulating, while on public property limited to streets, sidewalks and parks in the vicinity of polling places, a recall petition sponsored by Recall '92 to call an election to recall the present Governor of the State of Louisiana, Edwin Edwards; or
>
> (b) voting, whether absentee or on election day, November 3, 1992, while wearing 'Recall '92' t-shirts, buttons or other articles of clothing . . . "

Plaintiffs argue in support of the motion for injunction pending appeal that if they are not granted such relief they will, as a practical matter, be forever barred from soliciting at polling places on behalf of the recall petition. This is because under La. R.S. 18:1300.1 *et seq.* all

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[2] The district court declined to rule on Plaintiffs' claim that the statute was being discriminatorily applied to Plaintiffs in certain particular instances, ruling that such discriminatory application should be addressed in state court proceedings, particularly those in defense of any prosecution.

of the required signatures – in this instance approximately 750,000 minimum, a number that Plaintiffs apparently have not reached, – must be obtained within a 180-day period commencing with the initial circulation of such a petition, such period in this case ending on December 14, 1992 (as we understand it, no election is scheduled in Louisiana between now and December 14 except the November 3 general election). They also contend that polling places are a particularly good place for them to seek signatures, because of the congregation of people there and the fact that under Louisiana law the petition must have exact information respecting the registered voter's name, ward, precinct, and address as these appear on the rolls of the registrars of voters in the states.

On October 27, 1992, we certified to the Louisiana Supreme Court the following question:

> "Whether La. R.S. 18:1462A proscribed on election day, outside of the polling place itself but within a radius of six hundred feet from the entrance thereto, all solicitation of signatures for a recall petition that is not on the ballot that is to be voted on at the election for which the polling place is open, and in the polling place or said six hundred foot radius all wearing of clothing or buttons bearing visible words or symbols supportive of such recall?"

The Louisiana Supreme Court on October 29, stating that although "subsection (1) does not apply to the present case, we believe subsections (3) and (4) clearly proscribe the conduct at issue," answered the certified question as follows:

> "La. R.S. 18:1462(A)(3) proscribes on election day, outside of the polling place itself but within a radius of six hundred feet from the entrance thereto, all solicitation of signatures for a recall petition that is not on the ballot that is to be voted on at the election for which the polling place is open. La. R.S. 18:1462(A)(4) proscribes in the polling place or said six hundred foot radius all wearing of clothing or buttons bearing visible words or symbols supportive of such recall."

We conclude that Plaintiffs have shown the requisites for temporary injunctive relief pending appeal to the extent such relief is herein granted.[3] We have not hesitated to grant such relief ourselves in an appropriate case.

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[3] We said in *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1984):

> "In order to secure a preliminary injunction, the movant has the burden of proving four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not issued; (3) that threatened injury to the movant outweighs any damage injunction might cause to the opponent; and (4) that the injunction will not disserve the public interest. *Dallas Cowboy Cheerleaders v. Scoreboard Posters, Inc.*, 600 F. 2d 1184, 1187 (5th Cir. 1979).

The decision to grant or deny a preliminary injunction lies within the discretion of the district court and may be reversed on appeal only by a showing of abuse of discretion. *City of Meridian, Mississippi v. Algernon Blair, Inc.*, 721 F.2d 525, 527 (5th Cir. 1983). The four prerequisites for preliminary injunctive relief are mixed questions of fact and law. In reviewing the actions of the district court of abuse of discretion, we uphold the district court's findings of fact unless clearly erroneous. Fed.R.Civ.P. 52(a). The court's conclusions of law, however, "are subject to broad review and will be reversed if incorrect."

See Bran v. Independent American Savings Assn., 838 F.2d 739 (5th Cir. 1988); *Florida Businessmen v. City of Hollywood*, 648 F.2d 956 (5th Cir.1981); Fed.R.App. P. 8; 28 U.S.C. § 1651.

The record makes clear that there is a substantial threat that Plaintiffs will suffer irreparable injury if not allowed to solicit in the vicinity of polling places on November 3. A substantial part of this signature gathering strategy has been reasonably based on such anticipated solicitation.[4] The November 3 election provides one

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Commonwealth Life Insurance Co. v. Neal, 669 F.2d 300, 304 (5th Cir. 1982)."

In *Laurenzo v. Miss. H. S. Activities Assn.*, 708 F.2d 1038, 1042 (5th Cir. 1983), we noted that for an injunction pending appeal the likelihood of success standard could be modified if a substantial case on the merits were presented and the equities weighed heavily in the movant's favor.

The district court here did not separately address the temporary injunction from the merits, although we can infer from its disposition of the merits that it found Plaintiffs had not met their burden under the first factor, "substantial likelihood of success on the merits." The district court did not address the other temporary injunction factors. In denying Plaintiffs' motion for injunction pending appeal, the district court simply referred to its decision on the merits.

[4] The "being voted on in such election" language of clause (1) of section 1462A suggests that such solicitation is not prohibited. Although clauses (3) and (4) are not so limited, construing them to cover such solicitation might have appeared to render clause (1) redundant. An October 5, 1990, unpublished opinion of the Louisiana Fourth Circuit Court of Appeal in *Nathaniel Lacour, et al. v. State of Louisiana, et al.* No. 90-C-12772) held that solicitation of signatures for a petition for a recall election of certain local school board members was prohibited under section 1462A notwithstanding neither such matter nor the

of their prime opportunities to gather signatures, and no other such opportunity will present itself before December 14, 1992, when this petition will be wholly invalid if the requisite number of signatures has not then been procured.[5]

Moreover, we conclude that should we deny Plaintiffs interim relief in this respect, the threatened injury to them outweighs any damage that granting such relief would cause Defendants, and that the granting of such relief would not disserve the public interest. The evidence adequately shows that Plaintiffs intend to and are capable of conducting their solicitation properly and without disruption. Assuming the requisite likelihood of

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members in question were on the ballot. However, under Louisiana law unpublished opinions are not precedential, Louisiana Uniform Rules – Courts of Appeal, Rule 2-16.3, and the *Lacour* opinion is extremely brief and cites no authority. Until October 29, 1992, no other Louisiana court had spoken to the matter. Since *Lacour*, two Louisiana attorney general opinions, No. 91-597, November 12, 1991, and No. 92-650, September 24, 1992, held such solicitation not prohibited by section 1462A where the matter was not on the ballot, but did not cite *Lacour*. About a week before this suit was filed, the Louisiana Attorney General, in opinion No. 92-650(A), October 1, 1992, withdrew those two prior opinions and, relying wholly on *Lacour*, ruled that such solicitation was prohibited notwithstanding that the matter in question was not on the ballot.

[5] Plaintiffs also ask that we enjoin pending appeal any prohibition of their wearing "Recall '92 t-shirts, buttons or other articles of clothing" while voting on November 3. We do not believe that Plaintiffs will suffer irreparable harm or significant injury absent such relief; moreover, the interior of the polling place is a matter of greater interest to the state. We hence deny interim relief in this respect.

success, a matter discussed below, we cannot view the protection of such significant exercise of First Amendment rights as contrary to the public interest. See *Florida Businessmen* at 958.

We turn finally to Plaintiffs' likelihood of success on the merits.

We note that the distance prescribed by section 1462A is 600 feet, 6 times that sustained in *Burson;* the area involved is more that 1,130,000 square feet, approximately 36 times as large as that involved in *Burson* (31,400 square feet). This is greater than any state except Hawaii, which uses a 1,000 foot radius. Only two other states, Kentucky and Wisconsin, each five hundred feet, exceed three hundred feet. Some 37 or 38 states use 250 feet or less, some 25 of these using 100 feet or less. *See Note, Defoliating the Grassroots: Election Day Restrictions in Political Speech,* 77 Geo.L.J. 2137, 2146-479 2196-2200 (1989). So far as we have been able to determine, Louisiana first has a specific protected zone outside the polling place in 1960, using a three hundred foot radius. La. R.S. 1534; Acts 1960, No. 221. These provisions eventually came into section 1462, which was amended in 1980 to increase the distance from three hundred to six hundred feet. There is no indication of any legislative history, legislative committee reports, or findings of any study or research to explain or justify the amendment. The legislator who authored the amendment, a witness for Defendants, testified it was intended to substantially reduce the utility, and hence the use, of volunteer and paid campaign workers ("poll workers") contacting voters on their way to the polls. He testified that this was thought desirable for a variety of reasons: to avoid making that one

last attempt to influence a voter one way or another"; "many of these poll watchers were paid. . . . [I]f we could do away with the poll workers it would save the candidates in our area a great deal of money"; the election commissioners were often busy trying to keep individuals out of the three hundred foot area; there were sometimes "altercations" between "workers of candidates running against each other"; "one of the reasons . . . for the law was not to have people hassled in any way at all when they go to vote to try to encourage higher voter participation"; to change the situation where "a lot of the things that were handed out on election day were not correct. . . . [W]hen that happens in an election, you don't have a chance to respond to it if it's done on election day because the election is over before you have any chance. . . . " He stated that "we don't have poll workers at election precincts any more. That was the real purpose of the legislation and it has generally achieved that objective."

Another representative, a witness for the Defendants who was on the relevant committee and supported the 1980 amendment, testified that he did so "because in the district I live in, the 300 foot limit was very often not enough distance to keep people who were engaged in political activities from intersecting the voters who were going to the polls. . . . [M]aybe half of the precincts in my legislative district. . . . probably had parking lots which were outside of the 300 foot limits" and in such instances voters "as they got out of their cars and attempted to walk to the polls, very often were greeted by people handing out literature, people with signs, people trying to convince them that they should vote one way or

another." He further stated "I think for some people it's intimidating" and "I think it might discourage people from voting" because "I think they generally would like to make up their minds on who they are going to vote for, what they are going to vote for or against, and not be bothered with last minute efforts to change their minds." He also stated that ninety-five percent of the time when people leave their houses, they've made up their minds on who they're going to vote for or what issue they are going to vote for or against and that's the way it ought to be. And, I think that it would be good that if on election day people had the time to consider all of the issues, consider all of the paraphernalia that's been handed out, all the campaign rhetoric, and to make up their minds in a logical way and not have last minute efforts to change their minds." The witness further explained that although the six hundred foot limit did not wholly eliminate poll workers, with that limit "except in very rare instances" voters were no longer subjected to being contacted by such individuals after parking and while walking from their cars to the polling place.

Burson considerably relies on the consensus among the states. As Louisiana's is the second greatest restrictive zone of all of the states, using a radius twice the size of that in any of the forty-six of the states, *Burson* is to that extent less than strongly supportive of Defendants' position. Although the state has offered some justification for the six hundred foot extent of its prohibited zone, these justifications *as applied to political activity not related to any matter on the ballot* have limited relevance to the core concerns relied on in *Burson*, which were protecting the

integrity of the ballot from fraud and intimidation. Persons conducting political activity not related to a matter on the ballot have no incentive to attempt to prevent people from voting or to affect how they vote at the polling place, and the voters are certainly less likely to perceive that the activities of such persons are aimed at their voting or how they vote in the polling place. While there was evidence that it might be administratively confusing to distinguish between the two, this testimony was more in the way of speculation as opposed to being based on actual experience.[6] There may be some reasons in the nature of prohibiting overcrowding or physical obstruction that would justify eliminating a broad range of conduct in the immediate vicinity of the entrance to the polling place. But nothing suggests that such justification would have any significantly realistic application to non-ballot-related activities at anything near approaching the six hundred foot distance specified in the statute.

Prohibiting all political speech, whether or not ballot related, within a six hundred foot radius, may well be sufficiently narrowly tailored for *Burson* purposes.

We do not ultimately decide the merits of this case. But we are convinced that Plaintiffs have made a sufficient showing of a substantial case, with the equities

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[6] There is no evidence that the legislature specifically considered this aspect of the matter, other than the wording of the statute itself. The legislator who sponsored the 1980 amendment increasing the distance to six hundred feet testified: "I do not recall specifically any discussion of anything other than the actual people being at the polls for or on behalf of a candidate of an issue to be voted upon. That was what we were addressing."

being correspondingly in their favor, to justify a limited injunction pending appeal.

Accordingly, IT IS HEREBY ORDERED as follows:

Defendants, their agents and employees, and all persons acting in concert with them, are hereby enjoined, pending further order of this Court, from enforcing La. R.S. 18:1462 in such a manner as to preclude on November 3, 1992, the soliciting, on public streets, sidewalks or parks (or other outdoor public areas in which political solicitation is allowed under Louisiana law on days other than election or absentee voting days) not closer than one hundred feet to the entrance of any polling place, or persons to sign, or not to sign, a petition to call a recall election to recall Governor Edwin Edwards (or any other petition to call an election with respect to any person or proposition not on the November 3, 1992 ballot), provided such soliciting is carried out in a peaceable, quiet, and orderly manner.

Except as otherwise ordered, the request for injunction pending appeal is DENIED.